

1
2
3
FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

4 Apr 14, 2021
5
6 SEAN F. MCAVOY, CLERK

7 **UNITED STATES DISTRICT COURT**
8
9 **EASTERN DISTRICT OF WASHINGTON**

10 ADRIANA R.,¹

11 Plaintiff,

12 vs.

13 ANDREW M. SAUL,
14 COMMISSIONER OF SOCIAL
15 SECURITY,

16 Defendant.

17 No. 2:20-cv-00261-MKD

18 ORDER GRANTING PLAINTIFF'S
19 MOTION FOR SUMMARY
20 JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 14, 16, 18

13 Before the Court are the parties' cross-motions for summary judgment. ECF

14 Nos. 14, 16, 18.² The parties consented to proceed before a magistrate judge. ECF

15 _____
16 ¹ To protect the privacy of plaintiffs in social security cases, the undersigned
17 identifies them by only their first names and the initial of their last names. *See*
18 LCivR 5.2(c).

19 ² The Court ordered supplemental briefing, ECF No. 17, the response to which
20 Plaintiff styled as a supplemental motion for summary judgment, ECF No. 18.

1 No. 7. The Court, having reviewed the administrative record and the parties'
2 briefing, is fully informed. For the reasons discussed below, the Court grants
3 Plaintiff's motion, ECF No. 14, and denies Defendant's motion, ECF No. 16.

4 **JURISDICTION**

5 The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g);
6 1383(c)(3).

7 **STANDARD OF REVIEW**

8 A district court's review of a final decision of the Commissioner of Social
9 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
10 limited; the Commissioner's decision will be disturbed "only if it is not supported
11 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
12 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
13 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
14 (quotation and citation omitted). Stated differently, substantial evidence equates to
15 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
16 citation omitted). In determining whether the standard has been satisfied, a
17 reviewing court must consider the entire record as a whole rather than searching
18 for supporting evidence in isolation. *Id.*

19 In reviewing a denial of benefits, a district court may not substitute its
20 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,

1 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one
2 rational interpretation, [the court] must uphold the ALJ’s findings if they are
3 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
4 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an
5 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless
6 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”
7 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
8 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
9 *Sanders*, 556 U.S. 396, 409-10 (2009).

10 **FIVE-STEP EVALUATION PROCESS**

11 A claimant must satisfy two conditions to be considered “disabled” within
12 the meaning of the Social Security Act. First, the claimant must be “unable to
13 engage in any substantial gainful activity by reason of any medically determinable
14 physical or mental impairment which can be expected to result in death or which
15 has lasted or can be expected to last for a continuous period of not less than twelve
16 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s
17 impairment must be “of such severity that he is not only unable to do his previous
18 work[,] but cannot, considering his age, education, and work experience, engage in
19 any other kind of substantial gainful work which exists in the national economy.”
20 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

1 The Commissioner has established a five-step sequential analysis to
2 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
3 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner
4 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),
5 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the
6 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
7 404.1520(b), 416.920(b).

8 If the claimant is not engaged in substantial gainful activity, the analysis
9 proceeds to step two. At this step, the Commissioner considers the severity of the
10 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
11 claimant suffers from "any impairment or combination of impairments which
12 significantly limits [his or her] physical or mental ability to do basic work
13 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),
14 416.920(c). If the claimant's impairment does not satisfy this severity threshold,
15 however, the Commissioner must find that the claimant is not disabled. *Id.*

16 At step three, the Commissioner compares the claimant's impairment to
17 severe impairments recognized by the Commissioner to be so severe as to preclude
18 a person from engaging in substantial gainful activity. 20 C.F.R. §§
19 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more

20

1 severe than one of the enumerated impairments, the Commissioner must find the
2 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

3 If the severity of the claimant's impairment does not meet or exceed the
4 severity of the enumerated impairments, the Commissioner must pause to assess
5 the claimant's "residual functional capacity." Residual functional capacity (RFC),
6 defined generally as the claimant's ability to perform physical and mental work
7 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
8 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the
9 analysis.

10 At step four, the Commissioner considers whether, in view of the claimant's
11 RFC, the claimant is capable of performing work that he or she has performed in
12 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
13 If the claimant is capable of performing past relevant work, the Commissioner
14 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).
15 If the claimant is incapable of performing such work, the analysis proceeds to step
16 five.

17 At step five, the Commissioner considers whether, in view of the claimant's
18 RFC, the claimant is capable of performing other work in the national economy.
19 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,
20 the Commissioner must also consider vocational factors such as the claimant's age,

1 education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
2 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the
3 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
4 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other
5 work, analysis concludes with a finding that the claimant is disabled and is
6 therefore entitled to benefits. *Id.*

7 The claimant bears the burden of proof at steps one through four above.

8 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
9 step five, the burden shifts to the Commissioner to establish that 1) the claimant is
10 capable of performing other work; and 2) such work “exists in significant numbers
11 in the national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v.*
12 *Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

13 ALJ’S FINDINGS

14 On January 7, 2015, Plaintiff applied both for Title II disability insurance
15 benefits and Title XVI supplemental security income benefits alleging an amended
16 disability onset date of February 17, 2014. Tr. 23, 113, 378-98. The applications
17 were denied initially and on reconsideration. Tr. 190-93, 200-21. Plaintiff
18 appeared before an administrative law judge (ALJ) on July 11, 2017. Tr. 44-70.
19 On August 11, 2017, the ALJ denied Plaintiff’s claim. Tr. 158-83. Plaintiff
20 appealed the denial and the claim was remanded by the Appeals Council. Tr. 184-

1 88. Plaintiff appeared for a remand hearing on April 23, 2019. Tr. 71-101. On
2 May 13, 2019, the ALJ again denied Plaintiff's claim. Tr. 15-43.

3 At step one of the sequential evaluation process, the ALJ found Plaintiff,
4 who met the insured status requirements through March 31, 2019, has not engaged
5 in substantial gainful activity since February 17, 2014. Tr. 23. At step two, the
6 ALJ found that Plaintiff has the following severe impairments: mild right carpal
7 tunnel syndrome, right shoulder impingement status post-surgery, left hip labral
8 tear status post-surgery, cervical degenerative disc disease, and mild lumbar spine
9 spurring. Tr. 23-24.

10 At step three, the ALJ found Plaintiff does not have an impairment or
11 combination of impairments that meets or medically equals the severity of a listed
12 impairment. Tr. 25. The ALJ then concluded that Plaintiff has the RFC to perform
13 light work with the following limitations:

14 [Plaintiff] can only stand or walk 1 hour at a time for 4 hours in an 8-
15 hour workday. She can occasionally push and pull and reach
16 bilaterally, kneel, and crawl, frequently climb stairs and ramps, stoop,
17 and crouch, and never climb ropes, ladders, or scaffolds. She can
occasionally handle, and frequently finger and feel objects. She
should avoid frequent exposure to excessive vibrations, use of
dangerous or moving machinery, and exposure to unprotected heights.
Id.

18 At step four, the ALJ found Plaintiff is unable to perform any of her past
19 relevant work. Tr. 32. At step five, the ALJ found that, considering Plaintiff's
20 age, education, work experience, RFC, and testimony from the vocational expert,

1 there were jobs that existed in significant numbers in the national economy that
2 Plaintiff could perform, such as meter reader and merchandise marker. Tr. 33.
3 Therefore, the ALJ concluded Plaintiff was not under a disability, as defined in the
4 Social Security Act, from the alleged onset date of February 17, 2014, through the
5 date of the decision. Tr. 34.

6 On June 10, 2020, the Appeals Council denied review of the ALJ's decision,
7 Tr. 1-8, making the ALJ's decision the Commissioner's final decision for purposes
8 of judicial review. *See* 42 U.S.C. § 1383(c)(3).

9 ISSUES

10 Plaintiff seeks judicial review of the Commissioner's final decision denying
11 her disability insurance benefits under Title II and supplemental security income
12 benefits under Title XVI of the Social Security Act. Plaintiff raises the following
13 issues for review:

- 14 1. Whether the ALJ properly evaluated the medical opinion evidence; and
- 15 2. Whether the ALJ properly evaluated Plaintiff's symptom claims.

16 ECF No. 14 at 16.

17 DISCUSSION

18 A. Medical-Vocational Rules

19 As an initial matter, the Court ordered supplemental briefing on Plaintiff's
20 ability to communicate in English, and the impact of her potential inability to

1 communicate in English on the relevant Medical-Vocational Rule. ECF No. 17.

2 Plaintiff failed to challenge the ALJ's application of the Medical-Vocational Rules

3 in the opening brief. The Court ordinarily will not consider matters on appeal that

4 are not specifically and distinctly argued in an appellant's opening brief. *See*

5 *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir.

6 2008). The Ninth Circuit "has repeatedly admonished that [it] cannot

7 'manufacture arguments for an appellant.'" *Independent Towers v. Washington*,

8 350 F.3d 925, 929 (9th Cir.2003) (quoting *Greenwood v. Fed. Aviation Admin.*, 28

9 F.3d 971, 977 (9th Cir.1994)). Rather, the Court will "review only issues which

10 are argued specifically and distinctly." *Independent Towers*, 350 F.3d at 929.

11 When a claim of error is not argued and explained, the argument is waived. *See id.*

12 at 929-30 (holding that party's argument was waived because the party made only

13 a "bold assertion" of error, with "little if any analysis to assist the court in

14 evaluating its legal challenge"); *see also Hibbs v. Dep't of Human Res.*, 273 F.3d

15 844, 873 n.34 (9th Cir.2001) (finding an allegation of error was "too undeveloped

16 to be capable of assessment").

17 Based on the foregoing, the Court would be reasonably justified in finding

18 Plaintiff's arguments in the opening brief waived, and affirming the ALJ's

19 decision. However, the Court is mindful of the potential harsh outcome, which

20 could leave a meritorious claimant without Social Security benefits to which she

1 may be entitled when the fault lies solely with counsel. With this in mind, the
2 Court has reviewed the record, the ALJ's findings, and the supplemental briefing.

3 The ALJ applied Medical-Vocational Rules 202.11 and 202.18 in this case.
4 Tr. 33. Both rules apply to claimants who are able to communicate in English. 20
5 C.F.R. § 404, Appendix 2 to Subpart P. In the 2017 decision, the ALJ found
6 Plaintiff is not able to communicate in English and thus is considered in the same
7 way as an individual who is illiterate in English. Tr. 174. However, in 2019, the
8 ALJ found Plaintiff is able to communicate in English. Tr. 33. The ALJ does not
9 provide an explanation for the change in the analysis of Plaintiff's literacy.

10 There is substantial evidence in the record that demonstrates Plaintiff has
11 been unable to communicate in English throughout the relevant period. Plaintiff
12 reported on her disability report that she cannot speak, understand, read, or write
13 English. Tr. 454. Plaintiff attended school in Mexico through the sixth grade and
14 testified at her 2019 hearing that she can "understand a little, and I can speak a
15 little bit" of English, and she can read and write in English "just a little bit." Tr.
16 54-55. At medical visits, providers noted Plaintiff is a "Spanish-speaking female,"
17 Tr. 1024, "speaks no English," Tr. 644, and noted Plaintiff received assistance
18 completing written intake forms in English, Tr. 645, and the records from
19 Plaintiff's Workers' Compensation claim noted Plaintiff "is not fluent in the
20 English language," and "has limited English skills," Tr. 526, 757. Plaintiff was

1 noted as having an interpreter at multiple appointments through 2018. Tr. 869,
2 989-92, 1159. Plaintiff relied on a Spanish interpreter at the 2019 hearing, Tr. 73-
3 74.

4 Defendant argues there is substantial evidence to support the 2019 finding
5 that Plaintiff can communicate in English. ECF No. 19 at 2-4. Defendant cites to
6 Plaintiff's testimony that she can communicate in English "a little," Plaintiff taking
7 community college classes to learn English, and her ability to complete her
8 function report and interview for benefits in English. *Id.* (citing Tr. 452, 465-72).
9 However, the evidence of Plaintiff's function report and interview for benefits both
10 existed at the time the ALJ previously found Plaintiff unable to communicate in
11 English. Even after taking the English classes, Plaintiff reported she can only
12 understand and speak "a little" English. Tr. 55. Plaintiff was not asked when she
13 attended the English classes, however records from June 2017 indicate Plaintiff
14 had taken the courses prior to the 2017 hearing, as she reported trying to learn
15 English in a classroom setting but she discontinued the classes because the writing
16 caused an increase in pain, and she continued to "not speak English nor read and
17 write," as of June 2017. Tr. 527. The ALJ erred in finding Plaintiff was able to
18 communicate in English, without citing to any evidence to demonstrate Plaintiff
19 gained proficiency in English since the 2017 hearing. This error was harmful.
20

1 The ALJ found Plaintiff capable of performing light work with additional
2 limitations, and considered the Medical-Vocational Rules applicable for
3 individuals with light RFCs. Tr. 25, 32-33. Due to the ALJ's finding that Plaintiff
4 could communicate in English, he applied the Medical-Vocational Rules 202.11
5 and 202.18, which directed a finding Plaintiff was not disabled. Tr. 33. However,
6 the rule for someone who is age 50 to 54 and who is illiterate or unable to
7 communicate in English is Rule 202.09; while Rule 202.09 states a finding of
8 disability is directed for those with unskilled or no work, the rule also applies to
9 individuals with skilled work who can no longer perform their past work and who
10 do not have transferrable skills.³ POMS DI 25025.025(B). The ALJ found
11 Plaintiff has skilled past relevant work, but found Plaintiff was unable to perform
12 her past work. Tr. 32. The vocational expert testified that Plaintiff does not have
13 any transferrable skills. Tr. 63. As Plaintiff was limited to light work, is unable to
14 perform her past work, and has no transferrable skills, Rule 202.09 directed the

15
16 _____

17 ³ A claimant's ability to communicate in English was removed from consideration
18 in the Medical-Vocational Rules, effective April 27, 2020. Removing Inability to
19 Communicate in English as an Education Category, 85 Fed. Reg. 10,586 (Feb. 25,
20 2020). The Court applies the regulation in effect at the time of the ALJ's decision.

1 ALJ to find Plaintiff disabled as of November 13, 2017 if Plaintiff was found
2 unable to communicate in English.⁴

3 The ALJ also applied the rule for individuals who can communicate in
4 English to the time period prior to November 13, 2017. *See* 20 C.F.R. § 404,
5 Appendix 2 to Subpart P. Tr. 33. While Rule 202.16 directs a finding of non-
6 disability, Rule 201.17 directs a finding of disability had the ALJ found Plaintiff's
7 limited light RFC equated to a sedentary RFC rather than a light RFC. It is unclear
8 if the ALJ would have considered his decision differently had he found Plaintiff
9 unable to communicate in English. As such, the ALJ harmfully erred in finding
10 Plaintiff can communicate in English, without providing any explanation for the
11 finding. On remand, the ALJ is directed to incorporate Plaintiff's inability to
12 communicate in English into his findings, including applying the relevant Medical-
13 Vocational Rule and considering the impact of Plaintiff's language skills at step
14 five, or provide an explanation, supported by substantial evidence, as to why
15 Plaintiff is able to communicate in English.

16
17
18

19 ⁴ An individual attains a particular age on the day before their birthday. 20 C.F.R.
20 § 404.102. As such, Plaintiff attained age 50 on November 13, 2017.

1 **B. Medical Opinion Evidence**

2 Plaintiff contends the ALJ improperly evaluated the medical opinions. ECF
3 No. 14 at 19-20.

4 There are three types of physicians: “(1) those who treat the claimant
5 (treating physicians); (2) those who examine but do not treat the claimant
6 (examining physicians); and (3) those who neither examine nor treat the claimant
7 [but who review the claimant’s file] (nonexamining [or reviewing] physicians).”

8 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).
9 Generally, a treating physician’s opinion carries more weight than an examining
10 physician’s, and an examining physician’s opinion carries more weight than a
11 reviewing physician’s. *Id.* at 1202. “In addition, the regulations give more weight
12 to opinions that are explained than to those that are not, and to the opinions of
13 specialists concerning matters relating to their specialty over that of
14 nonspecialists.” *Id.* (citations omitted).

15 If a treating or examining physician’s opinion is uncontradicted, the ALJ
16 may reject it only by offering “clear and convincing reasons that are supported by
17 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
18 “However, the ALJ need not accept the opinion of any physician, including a
19 treating physician, if that opinion is brief, conclusory and inadequately supported
20 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228

1 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
2 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
3 may only reject it by providing specific and legitimate reasons that are supported
4 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81
5 F.3d 821, 830-31 (9th Cir. 1995)). The opinion of a nonexamining physician may
6 serve as substantial evidence if it is supported by other independent evidence in the
7 record. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

8 Plaintiff generally asserts that the ALJ improperly relied on non-examining
9 medical sources over treating and examining sources. ECF No. 14 at 20. The ALJ
10 addressed the opinions of a Robert Thompson, M.D., a testifying medical expert;
11 Arild Lein, M.D., a consultative examiner; Zach Strandy, DPT, a treating physical
12 therapist; B.T. Humble, D.O., a reviewing source; Ms. Lindsey Urso, PA-C, a
13 treating physician assistant; Christie Cebalios, PA-C, a treating physician assistant;
14 Ryan Barnes, M.D., a treating provider; Amy Dowell, M.D., an examining source;
15 and Barney Greenspan, Ph.D., Lisa Fitzpatrick, Psy.D., and Greg Saue, M.D., the
16 State agency psychological and medical consultants. Tr. 30-32. While Plaintiff
17 lists every examining and treating source, Plaintiff generally made broad
18 statements about the ALJ improperly rejecting the medical opinions, without
19 addressing which opinions were improperly rejected, nor addressing the reasons
20 offered by the ALJ to reject the opinions, nor addressing how any error is harmful

1 for most of the opinions. *See id.* at 13, 18-21. Plaintiff's failure to argue the
2 matter with specificity amounts to a waiver of the argument. *See Carmickle*, 533
3 F.3d at 1161 n.2. However, as the case is being remanded on other grounds, the
4 Court has considered the ALJ's decision and the evidence.

5 1. *Single Decision Maker*

6 The ALJ gave great weight to the "medical consultant's assessments." Tr.
7 32. An ALJ may not accord any weight to a non-physician single decision-maker
8 (SDM) opinion.⁵ *Morgan v. Colvin*, 531 Fed. App'x 793, 794-95 (9th Cir. June 21,
9 2013) (unpublished) (citing Program Operations Manual System DI 24510.050).
10 There is only one assessment from a medical consultant in the file; the other
11 assessment was completed by an SDM. Tr. 110, 122, 137, 153. As the ALJ
12 referenced multiple "assessments," it is unclear if the ALJ gave weight to the
13

14 5 Under the single decision maker (SDM) model, a State agency disability analyst
15 is able to determine a claimant's eligibility for benefits and sign the determination,
16 without having a medical consultant sign the determination, though the analyst
17 should have a psychological consultant complete the medical section, and mental
18 RFC, if there is evidence of a mental impairment. 20 C.F.R. §§ 404.906(b)(2),
19 416.1406(b)(2).

1 opinion of the SDM in his analysis. On remand, the ALJ is directed to give no
2 weight to the SDM.

3 *2. Other Opinion Evidence*

4 As the case is being remanded to reconsider Plaintiff's ability communicate
5 in English, and to give no weight to the SDM, the ALJ is also directed to
6 reconsider the other medical opinion evidence and perform the five-step analysis
7 anew.

8 **C. Plaintiff's Symptom Claims**

9 Plaintiff faults the ALJ for improperly discrediting her symptom claims.
10 ECF No. 14 at 16-19. An ALJ engages in a two-step analysis to determine whether
11 to discount a claimant's testimony regarding subjective symptoms. SSR 16-3p,
12 2016 WL 1119029, at *2. "First, the ALJ must determine whether there is
13 objective medical evidence of an underlying impairment which could reasonably
14 be expected to produce the pain or other symptoms alleged." *Molina*, 674 F.3d at
15 1112 (quotation marks omitted). "The claimant is not required to show that [the
16 claimant's] impairment could reasonably be expected to cause the severity of the
17 symptom [the claimant] has alleged; [the claimant] need only show that it could
18 reasonably have caused some degree of the symptom." *Vasquez v. Astrue*, 572
19 F.3d 586, 591 (9th Cir. 2009).

1 Second, “[i]f the claimant meets the first test and there is no evidence of
2 malingering, the ALJ can only reject the claimant’s testimony about the severity of
3 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
4 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
5 omitted). General findings are insufficient; rather, the ALJ must identify what
6 symptom claims are being discounted and what evidence undermines these claims.
7 *Id.* (quoting *Lester*, 81 F.3d at 834; *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th
8 Cir. 2002) (requiring the ALJ to sufficiently explain why it discounted claimant’s
9 symptom claims)). “The clear and convincing [evidence] standard is the most
10 demanding required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995,
11 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920,
12 924 (9th Cir. 2002)).

13 Factors to be considered in evaluating the intensity, persistence, and limiting
14 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
15 duration, frequency, and intensity of pain or other symptoms; 3) factors that
16 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
17 side effects of any medication an individual takes or has taken to alleviate pain or
18 other symptoms; 5) treatment, other than medication, an individual receives or has
19 received for relief of pain or other symptoms; 6) any measures other than treatment
20 an individual uses or has used to relieve pain or other symptoms; and 7) any other

1 factors concerning an individual's functional limitations and restrictions due to
2 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §
3 416.929(c). The ALJ is instructed to "consider all of the evidence in an
4 individual's record," to "determine how symptoms limit ability to perform work-
5 related activities." SSR 16-3p, 2016 WL 1119029, at *2.

6 The ALJ found that Plaintiff's medically determinable impairments could
7 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff's
8 statements concerning the intensity, persistence, and limiting effects of her
9 symptoms were not entirely consistent with the evidence. Tr. 26.

10 The ALJ's evaluation of Plaintiff's symptom claims and the resulting
11 limitations relies significantly on the ALJ's assessment of the medical evidence.
12 Further, the ALJ's evaluation failed to consider Plaintiff's symptom claims in light
13 of the fact that she would have been found disabled as of her 50th birthday had she
14 been found unable to communicate in English. Having determined a remand is
15 necessary to reconsider Plaintiff's ability to communicate in English and to
16 readdress the medical source opinions, any reevaluation must necessarily entail a
17 reassessment of Plaintiff's subjective symptom claims. Thus, the Court need not
18 reach this issue and on remand the ALJ must also carefully reevaluate Plaintiff's
19 symptom claims in the context of the entire record. *See Hiler v. Astrue*, 687 F.3d
20

1 1208, 1212 (9th Cir. 2012) (“Because we remand the case to the ALJ for the
2 reasons stated, we decline to reach [plaintiff’s] alternative ground for remand.”).

3 **D. Remedy**

4 Plaintiff urges this Court to remand for an immediate award of benefits.
5 ECF No. 14 at 21.

6 “The decision whether to remand a case for additional evidence, or simply to
7 award benefits is within the discretion of the court.” *Sprague v. Bowen*, 812 F.2d
8 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*, 761 F.2d 530 (9th Cir. 1985)).
9 When the Court reverses an ALJ’s decision for error, the Court “ordinarily must
10 remand to the agency for further proceedings.” *Leon v. Berryhill*, 880 F.3d 1041,
11 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (“the
12 proper course, except in rare circumstances, is to remand to the agency for
13 additional investigation or explanation”); *Treichler v. Comm’r of Soc. Sec. Admin.*,
14 775 F.3d 1090, 1099 (9th Cir. 2014). However, in a number of Social Security
15 cases, the Ninth Circuit has “stated or implied that it would be an abuse of
16 discretion for a district court not to remand for an award of benefits” when three
17 conditions are met. *Garrison*, 759 F.3d at 1020 (citations omitted). Under the
18 credit-as-true rule, where (1) the record has been fully developed and further
19 administrative proceedings would serve no useful purpose; (2) the ALJ has failed
20 to provide legally sufficient reasons for rejecting evidence, whether claimant

1 testimony or medical opinion; and (3) if the improperly discredited evidence were
2 credited as true, the ALJ would be required to find the claimant disabled on
3 remand, the Court will remand for an award of benefits. *Revels v. Berryhill*, 874
4 F.3d 648, 668 (9th Cir. 2017). Even where the three prongs have been satisfied,
5 the Court will not remand for immediate payment of benefits if “the record as a
6 whole creates serious doubt that a claimant is, in fact, disabled.” *Garrison*, 759
7 F.3d at 1021.

8 Here, the Court finds further proceedings are necessary to resolve conflicts
9 in the record. While Plaintiff argues she should be found disabled under the
10 relevant Medical-Vocational Rule due to her inability to communicate in English,
11 Defendant pointed to conflicting evidence regarding Plaintiff’s ability to
12 communicate in English as discussed *supra*, which Plaintiff did not provide any
13 responsive argument to in her reply brief.⁶ Further, even if the ALJ were to have
14

15⁶ The Court notes that Plaintiff’s reply brief to Defendant’s Motion for Summary
16 Judgment was due by February 19, 2021, ECF No. 13, and Plaintiff untimely filed
17 the reply on February 24, 2021, ECF No. 20. The February 24, 2021 deadline was
18 set for Plaintiff to file an optional reply brief to Defendant’s response to the Court-
19 ordered supplemental briefing, however Plaintiff’s reply does not address the
20 supplemental briefing. ECF No. 17; ECF No. 20.

1 fully credited the evidence of Plaintiff's inability to communicate in English, the
2 relevant Medical-Vocational Rule for the period prior to Plaintiff turning 50,
3 202.16, directs a finding of non-disability. *See* 20 C.F.R. § 404, Appendix 2 to
4 Subpart P. Further, additional proceedings are necessary for the ALJ to resolve the
5 conflicts in the medical opinion evidence. As such, the case is remanded for
6 further proceedings consistent with this Order.

7 **CONCLUSION**

8 Having reviewed the record and the ALJ's findings, the Court concludes the
9 ALJ's decision is not supported by substantial evidence and is not free of harmful
10 legal error. Accordingly, **IT IS HEREBY ORDERED:**

11 1. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **GRANTED**.

12 2. Defendant's Motion for Summary Judgment, **ECF No. 16**, is **DENIED**.

13 3. Plaintiff's Supplemental Motion for Summary Judgment, **ECF No. 18**, is

14 **DENIED** as moot.

15 4. The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff

16 REVERSING and REMANDING the matter to the Commissioner of Social

17 Security for further proceedings consistent with this recommendation pursuant to

18 sentence four of 42 U.S.C. § 405(g).

The District Court Executive is directed to file this Order, provide copies to counsel, and **CLOSE THE FILE**.

DATED April 14, 2021.

s/Mary K. Dimke
MARY K. DIMKE
UNITED STATES MAGISTRATE JUDGE

ORDER - 23